IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 472 OF 2002

Bahadur Jangali Chavan aged about 22 yrs. r/at Kaveri Road, Rani Sati Marg, Pathan Wadi, Indira Nagar, Malad (West), Mumbai -97 (at present in Judicial Custody in Yerawada Central Prison, Pune) ..Appellant (Org.Accd.No.2)

Versus

The State of Maharashtra Anti Narcotic Cell CB CID, Mumbai P.C.R. No.42/2000. ..Respondent

Ms.Anamika Malhotra, Advocate appointed for accused.
Mr. D.R.More, APP for State.

**CORAM: B.H. MARLAPALLE, J.**
**Date : October 1, 2007.**

**ORAL JUDGMENT:**

1. This appeal filed under Section 36-B of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the N.D.P.S. Act for short) read with Section 374 of Cr.P.C. arises from the order of conviction and sentence passed by the learned Special Judge (under N.D.P.S. Act) on 29/31-1-2002 in N.D.P.S. Special Case No. 169 of 2000. The present appellant - accused no.2 was put on trial with accused no.1 Shri

Surendra Ramnath Sharma for the offences punishable under Section 20(b)(ii) read with Section 8(c) and under Section 8(c) read with Section 20(b)(ii) read with Section 29 of the N.D.P.S. Act and both of them have been convicted for the offences levelled against them and have been sentenced to suffer RI for 10 years each and to pay a fine of Rs.2,00,000/- each, in default of payment of fine amount both of them to undergo further imprisonment for a period of six months.

2. As per the prosecution case, PSI Ajit Shankarrao Bartakke (PW 1) had received information on 5/9/2000, while he was Station House Officer at day duty at the office of Narcotic Cell, Cuff Parade, around 11.40 a.m., that two persons by name Surendra Sharma and Bahadur Chavan were expected between 2.45 p.m. to 3.30 p.m. on the same day in front of Midtown Hotel footpath, Kamani, Kurla (W), LBS Road for handing over Charas (Hashish) to the customers. Entry into the station diary was made to the same effect, witnesses were arranged, the police officers were subjected to search, the police party and the witnesses were taken to the Superior Officer PI Tele

and in turn the copies of the station diary entry were handed over to the ACP, DCP and on their instructions PW 1 proceeded to lay a trap as per the information received. On the instructions of PI Tele, the members of the raiding party were searched by the panch witnesses and the panchas were also searched. The vehicle in which the raiding party was required to travel was also searched. The raiding party subsequently left the office at 1.10 p.m. and reached Sheetal Talkies, Kurla, around 2.15 p.m. where the informant was waiting for PSI Bartakke. PI Tele was also member of the raiding party. While the raiding party was keeping a constant watch near hotel Midtwon, at about 3.10 p.m. they noticed two persons coming from Ghatkopar side and they were holding one bag each. They stood near hotel Midtown and were noticed waiting for somebody. They were observed for two minutes, during which the informant apprised PI Tele as to who is Surendra Sharma and who is Bahadur Chavan and the informant immediately disappeared from the place. On a signal given by PI Tele the staff and members of the raiding party surrounded both the persons, their bags were searched and in one bag held by accused no.1, Charas weighing 10 Kgs. and in the

second bag held by accused no.2, Charas weighing 5 Kgs. was found. Two separate samples from both the bags were drawn and sealed . The raiding party along with the accused persons and muddemal came back to the office at about 6.10 p.m. and submitted report and FIR (Exh.20) was recorded by PSI Sarak (PW 4). Written entry was made in the station diary on the directions of PI Tele and further investigation was carried out by PSI Sarak (PW 4).

3. The prosecution examined in all four witnesses i.e. PW 1 - Ajit Shankarrao Bartakke, PW 2 - Suresh Sakharam Jagtap, PN - 216543 attached to General Branch, PW 3 - Vinayak Kashinath Deshmane, a panch witness and PW 4 - PSI Dada Bhagwan Sarak. The evidence of PW 2 - Jagtap is on a limited point, namely, that the sample packets in C.R. No. 42 of 2000 were carried by him to the office of Chemical Analyser, Kalina after making station diary entry along with the forwarding letter marked as Exh.22. He stated that he handed over the packets marked as A-1 and B-1 with duplicate letter at the office of Chemical Analyser to the concerned Clerk who gave acknowledgement on office copy of the forwarding

letter. On his return to the Anti Narcotic Cell, he made entry in the station diary and his statement was recorded. He pointed out before the court that Article Nos. 10 and 11 were the same packets which he had carried to the office of C.A. on 6/9/2000. In his cross-examination he deposed that PI Tele had collected the two sample packets from stores under a letter. The stores is at Azad Maidan. He could not tell who had prepared and signed the forwarding letter at Exh.22 and so was the case with seal impression on it. He denied the suggestion that he did not carry any sample packets to the office of C.A. in his cross-examination. The C.A. report at Exh.32 indicated that in both the packets Charas was detected. In addition, the weight of the seized Charas quantity on the spot from each of the accused is a commercial quantity as defined under the N.D.P.S. Act.

4. Having regards to the evidence of PW 1 and PW 4 it is clear and not disputed that the mandatory provisions of Section 42 of the Act were complied with and as far as Section 50 is concerned, the contraband was not recovered from the person of the accused and

on the contrary it was recovered from the two bags held by both the accused. In such a situation the requirements of Section 50 of the Act would not be applicable as has been held in the case of State of Punjab Vs. Baldev Singh **(1999) 6 SCC 172]**. The only challenge which was raised by the learned Appointed Advocate for the accused is regarding the compliance of Section 55 of the NDPS Act. Ms.Malhotra, the learned appointed Advocate referred to the depositions of PW 4 Shri D. B. Sarak, PSI and submitted that when the contraband was brought to the police station and deposited under a letter by PI Tele and the Senior P.I. signed the slips which were affixed by PW 4 Sarak for affixing on the envelop (seized bags) but the Senior P.I. who was in-charge of the police station, did not put his seal on the same though PW 4 stated that the seized contraband was deposited vide Muddemal Entry No.30 marked at Exhibit 29 and the letter was at Exhibit 28. Section 55 of the Act reads as under:

> "**Police to take charge of articles seized and delivered. -** An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate,

> all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station."

It was submitted by Ms.Malhotra that all samples taken were required to be sealed with the seal of the officer-in-charge of the police station i.e. the Senior P.I. in the instant case and, therefore, the mandatory requirements of Section 55 of the Act were not complied with as is clear from the depositions of PW 4 Sarak. Though these submissions appear to be impressive at the first blush, it needs to be noted that the provisions of Section 55 of the Act are not mandatory as has been held in the case of Gurbax Singh Vs. State of Haryana **(2001) 3 SCC 28]** and reiterated in the case of Babubhai Odhavji Patel & ors. Vs. State of Gujarat **(2005) 8 SCC 725]**. It further needs to be noted that in the instant case there were no samples drawn in the presence of Senior P.I. after the contraband was deposited in the Muddemal Entry no.30 marked as Exhibit 29 and under the letter at

Exhibit 28 by PW 4 Sarak and in fact the sample packets marked as A-1 and B-1 were already prepared at the spot after drawing the samples and these sealed packets were handed over to PC 216543 - PW 2 Suresh Sakharam Jagtap who carried them with duplicate copy of forwarding letter to the chemical analyser. Section 55 of the Act has three parts. As per the first part an officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under the Act within the local area of that police station and which may be delivered to him. As per the second part an officer-in-charge of the police station shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them. The last part of Section 55 states that all samples taken shall also be sealed with the seal of the officer-in-charge of the police station but this applies obviously to the samples taken from the muddemal deposited with the police station and in front of the officer-in-charge. In the instant case, in my considered opinion, the last part of Section 55 will not be applicable. What

was stated by the witness PW 4 was that after the contraband was deposited with the Senior PI under the letter at Exhibit 28, the Senior PI signed the slips which were affixed by PW 4 on the reverse side of the two envelopes (seized packets) and the property was deposited in stores vide the muddemal entry no.14. In the instant case the Senior PI was not required to be a witness to the samples drawn from the muddemal deposited and, therefore, there was no requirement of sealing the samples with a seal of the officer-in-charge of the police station i.e. Senior P.I. on 5/9/2000. The entry at Sr. No.30 was effected by PSI Bartakke as was stated by PW 4.

5. The evidence on record clearly proved that 10 Kgs. of charas was recovered from the bag held by accused no.1 and 5 Kgs. of the said material was recovered from the bag in the possession of accused no.2 on 5/9/2000 (Panchanama at Exhibit 18-A). The mandatory requirements of Section 42 were followed and so also the provisions of Section 50 of the Act to the extent they were required to be followed. The trap was on the specific information received on 5/9/2000 and which was recorded by PW 1 - A.S. Bartakke at

about 11.40 a.m. The factum of search and seizure and recovery from the accused after laying the trap was communicated to the Senior P.I. by special report of the same date at Exhibit 30 signed by PW 4 - Sarak under Outward No.1596 of 2000. The time of arrest of accused was recorded at 16.45 hrs. and the place of recovery was noted as Footpath abutting Midtown hotel, LBS Marg, Kamani, Kurla and the total recovery was 15 Kgs. of charas. The report made was within 48 hours of the arrest and seizure and thus Section 57 of the NDPS Act was complied with. Undoubtedly the prosecution proved its case beyond reasonable doubts.

6. On the point of sentence the trial Court considered the age and dependency of both the accused. As far as charas is concerned, any quantity above one Kg. is commercial quantity. The trial Court awarded RI for a period of ten years for the offence punishable under Section 8(c) read with Section 20(b)(ii) and Section 8(c) read with Section 20(b)(ii) read with Section 29 of the NDPS Act. The said order is just and proper.

7. In the premises, this appeal fails and the

same is hereby dismissed. The order of conviction and sentence under appeal and passed in NDPS Special Case No.169 of 2000 by the learned Special Judge under the NDPS Act, Greater Mumbai is hereby confirmed.

**(B.H. Marlapalle,J.)**